IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH, JAIPUR.

O R D E R

Arun Kumar
Versus
Smt.Kamla Rani & Ors.

S.B. CIVIL WRIT PETITION NO.3601/2007.

Date of Order : 21/9/2007.

PRESENT
HON'BLE MR.JUSTICE MOHAMMAD RAFIQ

Shri Saransh Saini for the petitioner.
Shri M.M. Ranjan for the respondents.

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This writ petition has been filed at the instance of defendant-petitioner Arun Kumar, against whom the decree of eviction was passed in the suit filed by the plaintiff-respondents by the trial court on 1/8/1997. According to the petitioner, it was only after the Nazir

came to the premises in question for execution of the decree on 22/7/1998 that the petitioner came to know about ex-parte judgment and decree passed against him. Petitioner immediately moved an application under Order 9 Rule 13 CPC for setting aside the ex-parte judgment dated 1/8/1997 but the learned trial court rejected the same vide order dated 27/7/2006. The petitioner thereafter preferred appeal before the District Judge Jaipur City, Jaipur who also dismissed the appeal on 5/5/2007. The petitioner in this writ petition has prayed for quashing and setting the order dated 27/7/2006 passed by the trial court and the order dated 5/5/2007 passed by the appellate court with the further prayer to allow the

application filed by him under Order 9 Rule 13 CPC for quashing the impugned ex-parte judgment dated 1/8/1997.

2) I have heard Shri Saransh Saini, learned counsel for the petitioner and Shri Muni Man Ranjan, learned counsel for the respondents and perused the material on record.

3) Shri Saransh Saini, learned counsel for the petitioner argued that first summon was issued to the defendant for appearance on 3/9/1996. Again on 3/9/1996, summons were issued to the petitioner for appearance on 20/12/1996 and thereafter on 20/12/1996 summons were issued for service upon petitioner through registered post to appear on 7/2/1997. In the circumstances when service of notice was not effected,

plaintiff-respondent prayed for time for substituted service by way of publication of notice in newspaper which was filed on 21/2/1997. Application was allowed and the trial court on the same day directed publication of notice in daily Hindi newspaper and on that basis when the matter was taken up on 2/5/1997, it went unattended from the side of the defendant and the matter was proceeded ex-parte against the defendant-petitioner vide order of the trial court dated 2/5/1997.

4) The contention of the learned counsel for the petitioner is that address of the petitioner as given in the plaint was of his shop. The report was manipulated by the plaintiff that the shop was closed and the report of the process

server sands falsified from the fact that when the Nazir came to execute the decree, the shop was found open. In issuing notice on third date itself and thereafter permitting the plaintiff to apply for substituted service on the fourth date, clearly show that compliance of the provisions of Order 5 Rule 17 CPC was not made. According to the learned counsel for the petitioner, provisions of Order 5 Rule 17 and Rule 20 of CPC have not been complied with in making the service of summons and the learned courts below have wrongly assumed such service which has not been correctly effected on the petitioner. This amounts to an error apparent on the face of the record requiring interference by this Court in writ jurisdiction of

certiorari.

5) It was argued that in the instant case, summons were sent for service on the defendant only once and no meaningful efforts were made to get the notice served by mode of courier service. If service of notice was not possible on the address of the shop, then it should have been served on the residence of the defendant, which was not done by the plaintiff. The provisions of Order 5 Rule 17 CPC inter-alia provides that where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, who is absent at the time when

service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person if

any by whom the house was identified and in whose presence the copy was affixed. In the present case, this provision has not at all been followed. Learned counsel for the petitioner argued that registered notice could not be straightway issued on the second date. It was argued that before adopting the mandatory requirement of the provisions of Order 5 Rule 17 CPC, the substituted service by way of publication in the newspaper could not be adopted and the court was required to record its satisfaction according to Order 5 Rule 17 CPC while service notice by substituted mode/publication of notice in the newspaper. The court was required to record a categorical finding that it has reason to believe that the defendant is

avoiding service and only thereafter direction for publication of notice in the newspaper could have been issued.

6) Learned counsel for the petitioner further argued that newspaper in which notice was published was not having wide circulation around the area of the residence of the petitioner. It was argued that apart from aforesaid mandatory requirement of the provisions of Order 5 Rule 17 CPC, principles of natural justice have also been flouted.

7) In order to buttress his argument, learned counsel for the petitioner has placed reliance on the judgments of Hon'ble Apex court in **Sushil Kumar Sabharwal Vs. Gurpreet Singh and others : (2002) 5 SCC 377, Abbu Bakar & Anr. Vs.**

Deen Dayal & Anr. : 2006(4) RLW 2913 and Jagdish Prasad Swami Vs. Ramji Lal Joshi : 2007(2) WLC 133.

8) On the other hand, Mr.M.M. Ranjan, learned counsel for the respondents opposed the writ petition and argued none of the provisions of Rule 17 or Rule 20 or Order 5 of CPC was violated. It was argued that there was no requirement of law that registered notice could be served only after notice were affixed at the known address of the defendant at any conspicuous place near that. There was also no requirement of undertaking this exercise even for the purpose of publication of notice in the newspapers. It was argued that court can arrive at the satisfaction that defendant was avoiding

service while taking into consideration totality of the circumstances and not one of the isolated circumstances. Learned counsel argued that when the notices were sent to the petitioner, the process server reported that the shop was lying closed and owner of the adjoining shop informed that the shop was closed for quite sometime in the past. It was thereafter that the notice was sent by registered post and there was no illegality in doing so. Further, when the registered notice was also not served on the petitioner, the plaintiff filed an application for service on the defendant by publication of notice in the newspaper which was ordered on 21/2/1997. Shri M.M. Ranjan further submitted that Dainik Navjyoti is one of

the widely circulated newspaper in the State of Rajasthan and therefore, the plea that notice was not published in a newspaper having wide circulation in the area, cannot be accepted. Mr.M.M. Ranjan in support of his argument relied on the judgment of Hon'ble Supreme Court in **Basant Singh and another Vs. Roman Catholic Mission : (2002) 7 SCC 531.**

9) I have given my earnest consideration to the arguments of the learned counsel for the parties and perused the material on record.

10) Apart from three judgments, learned counsel for the petitioner has also placed on record of this case certified copies of certain order-sheets. On perusal of the aforesaid proceedings of the court, it

transpires therefrom that the suit was initially registered on 2/7/1996 and summons were issued to the defendant for appearance on 3/9/1996 which could not be served therefore, fresh notices were issued on 20/12/1996. When service could not be effected, learned trial court directed issuance of notice by registered post for return of notice on 7/2/1997. It was on 7/2/1997 that the plaintiff prayed for time to make an application for substituted service. The matter was posted for 21/2/1997 on which date the application of the plaintiff was allowed and vide order dated 2/5/1997 direction was issued to the respondent to get the notice published in the newspaper and notice having been published, when the

defendant-petitioner still failed to appear, the suit was ordered to proceed ex-parte against him.

11) Basant Singh, supra was a case in which the Hon'ble Supreme Court while dismissing the the appeal held that once it is proved that summons has been sent by registered post to a correct and given address, bald assertion without evidence that registered letter was not tendered would not be sufficient to discharge the statutory burden cast on the defendants. In that case, out of two defendants-appellants, one appeared as a witness, but he only made a simple statement denying receipt of summons and the other did not appear at all and no evidence whatsoever was led to rebut the presumption. The

Supreme Court held that defendants could have examined the postman, who would have been the material witness and whose evidence would have bearing for proper adjudication. Defendants failed to discharge the onus cast upon them by the statute. That apart, it was inherently improbable that the registered summons were duly served on one defendant but not on the other when they occupied the tenanted premises jointly. On the question of substituted service by way of publication in a local paper other than the one indicated by court, the Hon'ble Supreme Court held that if both the local dailies are widely circulated in the area the change of the name of the local daily from Dainik Bhaskar to Aacharan would not

materially affect the service of notice by way of substituted service.

12) Sushil Kumar Sabharwal, supra was a case in which Hon'ble Supreme Court held that before exercising its discretion of passing ex-parte decree, the court must be satisfied that due service of summons was proved. On alleged refusal of the defendant to accept the summons, process server's failure to affix a copy of the summons on the wall of the premises and instead returning the summons to the court with his endorsement on the back about defendant's refusal, amounted to non-service of the summons.

13) A co-ordinate Bench of this Court in Abbu Bakar, supra held that substituted service can be ordered only when the Court

is satisfied that sufficient efforts have been made to serve the defendant personally and there is reason to believe that defendant is keeping out of the way for the purpose of avoiding service.

14) In Jagdish Prasad Swami, supra, another co-ordinate Bench of this Court held that when Registered A.D. of summons bearing endorsement that no one was found and Postman was not examined, service become doubtful. In such circumstances, ex-parte decree was set-aside. As against this, when the judgment of the Supreme Court in Basant Singh is analysed, it becomes clear that substituted service by publication of the notice in even a local newspapers other than the one ordered by the court having wide circulation, would

not materially affect the service of notice by way of substituted mode, which shall not be invalidated the effect of substituted service just because the notice for substituted service has been published in a local daily not ordered by the court.

15) Reading of Order 5 Rule 20 CPC makes it clear that what is required by the court while directing service of notice on defendant by substituted mode is that the court should have reason to believe that the defendant was keeping out of the way for the purpose of avoiding service. In the present case, when on the first date, process server returned notice with the report that the shop was lying closed and owner of neghbouring shop also

reported that the shop was lying closed for quite sometime in the past, the court cannot be said to have committed any illegality while directing issuance of summons by registered post on the next date and two months thereafter when still notice could not be served on the defendant, request for substituted service by the plaintiff is validly entertained by the court. I am not inclined to accept the argument that in every case of this nature, application of substituted service in newspaper, should be entertained only after the notices are returned back.

16) The facts of Sushil Kumar, supra cannot be applied in the facts of the present case. Basant Singh, supra was a case wherein it was held that once it is

proved that summons were sent by registered post to a correct and given address, bald assertion without evidence that registered letter was not tendered would not be sufficient to discharge the statutory burden cast on the defendant which presumption could be rebutted presumption only by leading evidence.

17) Jagdish Prasad Swami was a case in which even though service of notice was taken to have been completed on the basis of endorsement made on the acknowledgment due that no one was found but because Postman was not examined, the court held that service became doubtful. In the present case, however, there is no such situation as service has not been treated to have been completed on the basis of

registered notice. Service was deemed complete on the basis of publication of notice in the newspaper.

18) In Abbu Bakar, supra, this Court held that substituted service can only be ordered if the court is satisfied that sufficient efforts have been made to serve the defendant personally. In the present case, I find that sufficient efforts were made and even if it was treated to be an irregularity in the service of notice, such irregularity as held by their Lordships in Basant Singh, supra as per second proviso to Order 9 Rule 13 CPC, would not affect the validity of the ex-parte decree. Second proviso to Rule 13 CPC clearly provides that no Court shall set-aside a decree passed ex-parte merely

on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim.

19) In the facts of the present case, it can be safely held that petitioner had notice of the pending proceedings and yet, he failed to participate therein at his own risk.

20) In the circumstances therefore, I do not find any infirmity in either of the impugned-orders.

The writ petition is dismissed with no order as to costs.

(MOHAMMAD RAFIQ), J.

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